Supreme Court, U.S.
FILED
MAR 6 2000
CLERK

(2)

No. 99-1123

In The

Supreme Court of the United States

ARTHUR CUTSHALL,

Petitioner,

v.

DON SUNDQUIST, in his official capacity as Governor of the State of Tennessee,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT DON SUNDQUIST IN OPPOSITION

PAUL G. SUMMERS
Attorney General & Reporter
State of Tennessee

MICHAEL E. MOORE
Solicitor General

DARYL J. BRAND
Associate Solicitor General

ALBERT L. PARTEE, III*
Senior Counsel
Office of the Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243
(615) 741-4082

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

QUESTIONS PRESENTED

Whether the Sixth Circuit correctly upheld Tennessee's Sex Offender Registry and Monitoring Act, after finding that the Act

a. is not a punishment violating the Double Jeopardy Clause or the Ex Post Facto Prohibition;

b. does not violate the right to travel interstate;

c. does not impose "stigma plus" an alteration of petitioner's legal status;

d. does not violate any alleged "right to pursue gainful employment;" and

e. does not violate any alleged constitutional privacy interest.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Origin of the Tennessee Act 1

2. Provisions of the Tennessee Act 2

3. Procedural History 3

ARGUMENT 4

1. The decision below upholding the Tennessee Act correctly applied the precedent of this Court 4

A. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Double Jeopardy Clause 5

B. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Ex Post Facto Prohibition 7

C. The Sixth Circuit correctly determined that petitioner's right to travel interstate was not affected by the Tennessee Act 8

D. The Sixth Circuit correctly ruled that the Tennessee Act produces no "stigma plus." 8

E. The Sixth Circuit correctly ruled that the Tennessee Act "does not implicate a constitutionally protected liberty or property interest in employment." 10

TABLE OF CONTENTS – Continued

Page

F. The Sixth Circuit correctly determined that petitioner has no right to keep registry information private 10

2. The alleged conflict between the Sixth Circuit's decision in this case and its own holding in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), does not warrant this Court's review 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Attorney General v. Soto-Lopez, 476 U.S. 898 (1986) 8

Board of Regents v. Roth, 408 U.S. 564 (1972) 10

Braxton v. United States, 500 U.S. 344 (1991) 12

Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999), *rehearing en banc denied* ..... *passim*

Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998) 6

Doe v. Pataki, 940 F. Supp. 603 (S.D.N.Y. 1996), *affd in part and revd in part*, 120 F.3d 1263 (2d Cir. 1997) 12, 13

E.B. v. Verniero, 119 F.3d 1077 (3rd Cir. 1996), *cert. denied*, 522 U.S. 1110 (1998) 6

Hudson v. United States, 522 U.S. 93 (1997) 5

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) 12, 13

Kansas v. Hendricks, 521 U.S. 346 (1997) 7

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 7

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) 5

Lange-Kessler v. Department of Education of the State of New York, 109 F.3d 137 (2d Cir. 1997) 10

Lynce v. Mathis, 519 U.S. 433 (1997) 7

Olmstead v. United States, 277 U.S. 438 (1928) 11

Paul v. Davis, 424 U.S. 693 (1976) 8

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998) 6

TABLE OF AUTHORITIES – Continued

Page

Salibra v. Supreme Court of Ohio, 730 F.2d 1059 (6th Cir. 1984) 8

U.S. Dept of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 10, 11

Whalen v. Roe, 429 U.S. 589 (1977) 11

Wisconsin v. Constantineau, 400 U.S. 433 (1971) 9

FEDERAL STATUTES

42 U.S.C. § 1983 3

42 U.S.C. § 14071(a)(1)(A) (1994) 1

42 U.S.C. § 14071(d) (1994) 2

42 U.S.C. § 14071(f)(1) (1994) 2

42 U.S.C. § 14071(f)(2)(A) (1994) 2

STATE STATUTES

Tenn. Code Ann. § 40-39-101 2

Tenn. Code Ann. § 40-39-103 2

Tenn. Code Ann. § 40-39-104 2

Tenn. Code Ann. § 40-39-106(a) 2

Tenn. Code Ann. § 40-39-106(c) 3

STATEMENT OF THE CASE

This case concerns the constitutionality of the Tennessee Sex Offender Registry and Monitoring Act. Tenn. Code Ann. §§ 40-39-101 to -108. Respondent offers the following as a correct account of the pertinent facts in this case:

1. Origin of the Tennessee Act. In 1994, Congress enacted, and the President signed into law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (the Federal Act). Under this legislation, the Attorney General of the United States was required to establish guidelines for state programs requiring persons convicted of crimes against minors or crimes of sexual violence to register a current address with state law enforcement officials. 42 U.S.C. § 14071(a)(1)(A); *Cutshall v. Sundquist*, 193 F.3d 466, 469 (6th Cir. 1999), *rehearing en banc denied* (6th Cir., November 19, 1999).

The Federal Act provides in part:

> The information collected under a State registration program shall be treated as private data except that – (1) such information may be disclosed to law enforcement agencies for law enforcement purposes; (2) such information may be disclosed to government agencies conducting confidential background checks; and (3) the designated State law enforcement agency and any local law enforcement agency authorized by the State agency may release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim

> of an offense that requires registration under this section shall not be released.

42 U.S.C. § 14071(d) (1994).

Under the Federal Act, the states were given three years from September 1, 1994, within which to comply. *See* 42 U.S.C. § 14071(f)(1) (1994). Failure to implement a registration program would result in the loss of some federal funding. *See* 42 U.S.C. § 14071(f)(2)(A).

In 1994, Tennessee complied with the Federal Act by adopting its own sex offender registration and monitoring act. Tenn. Code Ann. §§ 40-39-101 to -108. The Tennessee Bureau of Investigation (TBI) is charged with administration of the Tennessee Act. Tenn. Code Ann. § 40-39-106(a).

2. Provisions of the Tennessee Act. A sex offender approaching release from incarceration receives a "Sexual Offender Release Notification" which advises of the legal requirement to register. (R. 22 Addendum at p. 23, Apx. at p. 71). Within ten days after release, the registrant is required to supply limited information to the registry, such as the registrant's name and aliases, some identifying information, current and previous address and phone number, and the name, address, and phone number of a current or previous employer. Tenn. Code Ann. §§ 40-39-103 and -106(a) (R. 22 Addendum at pp. 3-5, Apx. at pp. 50-52). Quarterly, the registry sends a letter to the registrant requesting updated information. Tenn. Code Ann. § 40-39-104 (R. 22 Addendum at p. 4, Apx. at p. 51).

Limited public release of registry information is allowed only when "necessary to protect the public

concerning a *specific* sexual offender. . . . " Tenn. Code Ann. § 40-39-106(c) (emphasis added). Even then only information "relevant" to a threat to public safety may be released. *Id.*

Pursuant to the "Sex Offender Registry Instructions for Department of Correction, Board of Parole, and Law Enforcement Officials," under the "Confidentiality" section, the TBI advises that:

> Information may only be released on a *specific* offender by local law enforcement if it is deemed to be in the interest of public safety. Lists of offenders shall not be released.

(R.22 Addendum at p. 21, Apx. at p. 69).

3. Procedural History. In anticipation of his release from prison and the requirement that he register upon release, petitioner filed a complaint in the United States District Court for the Middle District of Tennessee pursuant to 42 U.S.C. § 1983 asking that the Tennessee Act be declared unconstitutional and that its enforcement against him be enjoined. On September 17, 1997, the district court entered a preliminary injunction against enforcement of the Tennessee Act. On September 25, 1997, after oral argument on cross-motions for summary judgment, the district court entered a final order. Without discussion, the trial court held registration under the Tennessee Act to be constitutional, but held that dissemination of registry information outside the law enforcement community could occur only after petitioner was given pre-release notice and an opportunity to be heard.

The parties filed cross-appeals to the Sixth Circuit. After oral argument, the court of appeals, in a two-to-one

decision, upheld the Tennessee Act in its entirety. Petitioner's request for rehearing en banc was denied. Petitioner now asks this Court to grant discretionary review. Respondent opposes the petition.

ARGUMENT

1. The decision below upholding the Tennessee Act correctly applied the precedent of this Court.

Petitioner contends that the Sixth Circuit "ignored substantial evidence of punitive intent" and failed to perform a "fair reading of the text and structure of the Act." He urges this Court to declare that the purported evidence of punitive intent in the legislative history of the Tennessee Act is paramount and controlling and requires striking down the Act as a violation of the Double Jeopardy Clause, the Ex Post Facto Prohibition, the right to travel interstate, a purported "right to pursue gainful employment," and an alleged constitutional privacy interest. Because the Sixth Circuit correctly applied the precedent of this Court in upholding the Tennessee Act, and petitioner fails to identify any conflict between the decision below and the decisions of other circuits, this case does not present an occasion for an exercise of this Court's certiorari jurisdiction.

A. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Double Jeopardy Clause.

Petitioner wants this Court to "declare the role of legislative history in the determination of punitive intent" under the intent-effects test of *Hudson v. United States*, 522 U.S. 93 (1997). (Petition at 13). He contends that the "Sixth Circuit improperly ignored . . . substantial evidence of punitive intent," and that the "clear statements of the Act's sponsors and other legislators *should have* been given substantial weight and *should have* acted as authoritative guides to the conclusion that the Tennessee legislature intended the Tennessee Sexual Offender Registration and Monitoring Act to serve punitive purposes." (Petition at 15, 17) (emphasis added).

Notwithstanding the petitioner's assertions regarding what the law "should" be, the Sixth Circuit noted his reliance upon the legislative history, but followed well-settled precedent and looked "primarily to [the] language" of the Tennessee Act for its intent. *Cutshall*, 193 F.3d at 472, 474. This Court has repeatedly held that "[t]he starting point in every case involving the construction of a statute is the language itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). Finding no ambiguity in the text of the statutes, the Sixth Circuit found no need to address legislative history any further.

The unambiguous text of the Tennessee Act either duplicates or follows the text of the Federal Act, 42 U.S.C. § 14071; some variation of which has now been adopted

by all 50 states. (Petition at 27). The Sixth Circuit noted Tennessee's need to comply with the Federal Act by either passing a derivative act or facing monetary sanction for failing to do so. *Cutshall*, 193 F.3d at 470. It would have produced a great anomaly for the Sixth Circuit to find that the Tennessee Act, alone among the 51 textually similar laws adopted by other jurisdictions, was "punishment" simply because of the comments of a few legislators.

Indeed, this Court has denied review in other cases in which courts of appeals upheld the constitutionality of similar state acts against ex post facto challenges. *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (held New York Act notification provisions were not ex post facto punishment), *cert. denied*, 522 U.S. 1122 (1998); *Russell v. Gregoire*, 124 F.3d 1079, 1086-1087 (9th Cir. 1997) (held Washington State Act notification provisions were not ex post facto punishment), *cert. denied*, 523 U.S. 1007 (1998); *E.B. v. Verniero*, 119 F.3d 1077 (3rd Cir. 1996) (held that New Jersey Act was not ex post facto punishment), *cert. denied*, 522 U.S. 1110 (1998).

Petitioner further complains that the majority "*ignored* the substantial evidence of punitive intent found in the text of the [Tennessee] Act and in other provisions of the Tennessee Code." (Petition at 17) (emphasis added). He urges that "[a] *fair reading* of the text and structure of the Act would have *bolstered* the conclusion from the legislative history that the Act was meant to serve punitive purposes." (Petition at 17) (emphasis added).

This argument not only reverses the order of precedence in statutory construction by using text to "bolster" legislative history, it is simply incorrect. The Sixth Circuit did not "ignore" the effect of the Tennessee Act or fail to give it a "fair reading" under Double Jeopardy analysis. In fact, the court performed an exhaustive review of the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to conclude that the effect of the Tennessee Act is non-punitive. *Cutshall*, 193 F.3d at 473-76. As the court below correctly determined, Tennessee adopted its version of the act to comply with Federal law, to assist law enforcement in solving crimes, and to help the public protect itself.

B. The Sixth Circuit correctly determined that the Tennessee Act is not a punishment under the Ex Post Facto Prohibition.

Applying the test in *Lynce v. Mathis*, 519 U.S. 433 (1997), there is no dispute about the retroactive application of the Tennessee Act. As in his Double Jeopardy challenge, petitioner asks this Court to "declare the role of legislative history in the determination of punitive intent" under the Ex Post Facto Prohibition. (Petition at 13). However, this also is a settled matter. The Sixth Circuit majority correctly noted this Court's use of the *Kennedy* factors in *Kansas v. Hendricks*, 521 U.S. 346, 360-69 (1997) to review whether there was a punishment for purposes of either the Double Jeopardy Clause or the Ex Post Facto Prohibition. "Using this approach, we conclude, once again, that the [Tennessee] Act was not

intended to punish, and its requirements do not transform the law into punishment" under the ex post facto analysis. *Cutshall*, 193 F.3d at 477.

C. The Sixth Circuit correctly determined that petitioner's right to travel interstate was not affected by the Tennessee Act.

In a single sentence, petitioner asserts without citation to authority that the "legislative history" reflects that the Tennessee Act was "intended to interfere with Petitioner's constitutional right to travel freely between the states." (Petition at 25). He cannot and does not show any actual interference under *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Citing *Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1064-65 (6th Cir. 1984), the lower court found that the "Tennessee Act applies to all sex offenders residing in Tennessee regardless of where they were convicted," that the Act "contains no duration of residency restriction," and that, since all 50 states now have sex offender registries, "Tennessee is no more or less attractive than any other state for a sex offender seeking a place to reside in total anonymity." *Cutshall*, 193 F.3d at 478.

D. The Sixth Circuit correctly ruled that the Tennessee Act produces no "stigma plus."

Presuming that registration and any release of registry information to the public produces a "stigma," petitioner urges that a change in legal status produces the "plus" contemplated by this Court in *Paul v. Davis*, 424 U.S. 693 (1976). (Petition at 21-22). The court of appeals,

however, correctly found that the Act triggers no requirement for constitutional procedural due process.

In this Court, petitioner relies upon the rationale of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), to find a change of status in the registration requirement itself: the "burden" of keeping registry information current, the criminal sanction for failing to comply with the Tennessee Act, and the possibility that law enforcement may disseminate his registry information to the public. (Petition at 22). In this way, petitioner has used registration and any release of registry information to meet both the "stigma" and the "plus" requirements, a logical impossibility. Moreover, the Sixth Circuit correctly found the "burden" of compliance to be "small." *Cutshall*, 193 F.3d at 476. The existence of a criminal sanction for noncompliance is not itself an alteration of any legal status; a valid law may certainly include an enforcement mechanism.

In the Sixth Circuit, petitioner claimed "that loss of employment and violation of his privacy rights satisf[ied] the 'plus' requirement. . . . " *Cutshall*, 193 F.3d at 479. As discussed more fully below, the court of appeals correctly ruled that there is no "general right to private employment," that the Tennessee Act did not prevent him from obtaining government employment, and that petitioner has no right to keep registry information private. *Id.* at 479-80.

E. The Sixth Circuit correctly ruled that the Tennessee Act "does not implicate a constitutionally protected liberty or property interest in employment."

Petitioner finds a general "right to pursue gainful employment" under *Board of Regents v. Roth*, 408 U.S. 564, 573-74 (1972) and *Lange-Kessler v. Department of Education of the State of New York*, 109 F.3d 137, 140 (2d Cir. 1997), a right that he contends is "affected by the Act." (Petition at 23). The Sixth Circuit correctly rejected petitioner's argument that there is a "general right to private employment." *Cutshall*, 193 F.3d at 480. Under *Roth*, a constitutionally protected right to employment has been recognized for government employees where either state law or an agreement limits the ability of the government to terminate that employment.

Petitioner does not challenge the lower court's finding that the Tennessee Act "in no way infringes upon Cutshall's ability to seek, obtain, and maintain a job" or prevent "him from obtaining government employment." *Cutshall*, 193 F.3d at 480. Petitioner simply asks in conclusory fashion that this Court believe that the Tennessee Act was "intended" to and will affect an "offender's employment." (Petition at 23).

F. The Sixth Circuit correctly determined that petitioner has no right to keep registry information private.

The court of appeals correctly rejected the district court's finding that petitioner has such a right under *U.S. Dept of Justice v. Reporters Comm. for Freedom of the Press*,

489 U.S. 749, 767 (1989), a case involving the statutory construction of the Freedom of Information Act. *Cutshall*, 193 F.3d at 481. The court of appeals relied instead upon *Whalen v. Roe*, 429 U.S. 589 (1977), finding that the "Constitution does not provide Cutshall with a right to keep his registry information private, and the Act does not impose any restrictions on his personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights." *Cutshall*, 193 F.3d at 481. Petitioner presents no argument to the contrary, but urges this Court to create a new privacy interest specifically to fit this case.

In the context of his "stigma plus" argument, petitioner asks this Court to depart from *Whalen* and to recognize an expansive new constitutional privacy interest based upon a dissent by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), and a statutory interpretation of the Freedom of Information Act in *Reporters Comm. for Freedom of the Press*, 489 U.S. at 767. As argued above, the court of appeals correctly refused to recognize such an interest. Petitioner has presented no compelling reason why this Court should depart from *Whalen* and extend constitutional privacy to addresses and phone numbers.

2. The alleged conflict between the Sixth Circuit's decision in this case and its own holding in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), does not warrant this Court's review.

Petitioner also contends that the holding in this case conflicts with the Sixth Circuit's ruling in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). But any inconsistency between the decision below and prior Sixth Circuit precedent is for that court to resolve and does not justify review by this Court. *Braxton v. United States*, 500 U.S. 344 (1991).

In any event, there is no conflict between the ruling in *Kallstrom* and the ruling in *Cutshall*. In *Kallstrom*, the city released information from the personnel files of undercover law enforcement officers to the attorneys for drug dealers who were known to be violent and who had been investigated by the officers in question. *Kallstrom*, 136 F.3d at 1059. The court of appeals ruled that where the government "clearly should have known that its actions specifically" would endanger an individual there should be no release of any "private information [that] places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat." *Id.* at 1064, 1066. Citing *Doe v. Pataki*, 940 F.Supp. 603, 608-11 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 120 F.3d 1263 (2d Cir. 1997), petitioner attempts to conjure a specific threat to bring himself within the rule of *Kallstrom*. (Petition at 25). Petitioner's reliance on *Pataki* as presenting an "undisputed record of numerous acts of physical harm directed at registrants and their families" is an exaggeration and is misplaced reliance upon random events from four years ago in New York, New

Jersey, and Oregon. The *Pataki* opinion does not bring petitioner within the specific, particularized rule set out in *Kallstrom*. Indeed, petitioner made no attempt to litigate *Kallstrom* issues in the district court, and made no factual showing of any specific threat or risk of harm facing him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ALBERT L. PARTEE, III
Senior Counsel
Office of the Attorney General
425 5th Avenue North – 3rd Floor
Nashville, Tennessee 37243
(615) 741-4082